

**SKYWIZARD.COM, LLC,**

***Plaintiff***

v.

Docket No. 99-275-P-DMC

**COMPUTER PERSONALITIES  
SYSTEMS, INC.,**

***Defendant***

Skywizard.com, LLC (“Skywizard”) filed suit on September 8, 1999, invoking the court’s diversity jurisdiction to decide a claim of breach of contract against Computer Personalities Systems, Inc. (“CPSI”). A bench trial in this matter was held before me on April 24-25, 2000, during which the defendant moved pursuant to Fed. R. Civ. P. 52(c) for judgment on partial findings. I granted the motion with respect to all alleged breaches save one, concerning the defendant’s failure to run a special promotion in September 1999, as to which I reserved judgment. I now find for the plaintiff on that claimed breach and set forth the basis for that decision, as well as for my ruling pursuant to Rule 52(c), in the form of the following findings of fact and conclusions of law.

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## **I. Findings of Fact**

1. In early 1998 Gary Cubeta and his sister Gail Ejdys founded Skywizzard, a Maine limited liability company with its principal place of business in York, Maine, for the purpose of entering the internet service provider (“ISP”) market.<sup>2</sup> Cubeta is president and Ejdys is vice-president of Skywizzard.

2. The highly competitive ISP business comprises approximately 5,000 providers nationwide, including America On Line (“AOL”), CompuServe and Prodigy.

3. To break into the ISP business, Cubeta and Edjys determined that they would form a strategic alliance with either a manufacturer or reseller of computer hardware in which the manufacturer or reseller would promote Skywizzard’s service. They elected to enter into such an agreement with CPSI, a Pennsylvania-based retailer of computer hardware and software whose principal, George Cappell, markets products through so-called “infomercials” aired both on national cable channels and on “Direct 2 U,” an infomercial channel owned or controlled by CPSI.

4. On or about May 13, 1999 Skywizzard and CPSI entered into an agreement (the “Contract”) that provides, in relevant part:

4. Exclusive Promotion. During the Term of this Agreement, CPSI shall promote Skywizzard.com’s internet access services, to the exclusion of any other internet access services (including, without limitation, America On-Line, CompuServe, Prodigy, Mindspring, Earthlink, AT&T Worldnet, etc.), in the following manner: (a) CPSI shall add Skywizzard.com’s internet access software, to the exclusion of any other internet access software, on each and every computer unit sold by CPSI or any agent thereof; and shall use all reasonable efforts to prevent the inclusion of any competing internet access software on CPSI’s computer units, keeping Skywizzard.com apprised of the specific results of such efforts; (b) Skywizzard.com software shall be loaded onto every system sold by CPSI such that the customized Skywizzard.com logo shall appear on the desktop upon turn-on . . . .

Note: Notwithstanding anything in this Agreement to the contrary, CPSI shall

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<sup>2</sup>An ISP provides internet access, including e-mail services, to its subscribers.

be deemed to be in compliance with subsection (a), despite the existence of non-Skywizard.com internet access software on CPSI's computer units, so long as the icons for such software are contained exclusively within the "Windows Explore" menu of the computer, and not initially visible on the desktop, and so long as the inclusion of said competing software on CPSI's computer units is beyond CPSI's reasonable control, including without limitation, as a result of any CPSI agreement with any manufacturer or supplier (provided, however, that CPSI shall use all reasonable efforts to prevent the inclusion of any competing internet access software on CPSI's computer units, and shall keep Skywizard.com apprised of the specific results of such efforts). CPSI shall not be obligated, however, to make any modification to Microsoft proprietary software (including, without limitation, MSNetwork). At such time when CPSI first begins to produce its own custom computer units then this proviso shall cease to apply and CPSI shall strictly comply with subsection (a) with respect to such CPSI-produced units.

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7. Special Promotion Program. On September 1 of each calendar year during the Term of this Agreement (each, a "Start Date") and continuing thereafter for a period of twelve (12) months from each such Start Date (each, a "Promotion Year") during the Term of this Agreement, the parties shall conduct a special promotion program (the "Program"), pursuant to which CPSI shall include twelve (12) months of prepaid Skywizard.com-brand internet access service as part of each customer's Promotion Unit (as defined below) purchased pursuant to the Program (each, a "Special Promotion"), all in accordance with and subject to the terms and conditions set forth in this paragraph 7. Such services shall be provided by Skywizard.com to customers under Skywizard.com's normal terms and conditions. The parties acknowledge and agree that the Program shall commence as of September 1, 1999 (the "Program Start Date").

(a) Promotion Timing and Units. . . . [D]uring each month of each Promotion Year, CPSI shall commence one (1) Special Promotion with respect to a single computer unit model or package selected by CPSI (each, a "Promotion Unit"). Each monthly Special Promotion shall be conducted and continue for a period of one (1) weekend selected by CPSI, to be started on a Saturday and completed on a Sunday. The Special Promotion shall apply to all Promotion Units sold by CPSI during such weekend, or sold via order placed by a customer who elects to participate in the Special Promotion and remits payment for a Promotion Unit subsequent to the completion of the Special Promotion. . . .

(b) Promotion Procedures. . . . CPSI shall employ substantially the same general advertising and customer service methods and procedures in connection with each Promotion as it employs with respect to its regular weekly promotions for similar products from time to time. . . .

(c) Promotion Fees. . . . Within seven (7) days following the end of each calendar month during which a Special Promotion is completed, CPSI shall remit to Skywizard.com . . . an internet access service fee (each, a “Promotion Fee”) equal to the Wholesale Cost (as defined below) multiplied by the number of Promotion Units shipped by CPSI to customers during such month pursuant to a Special Promotion hereunder. . . . For purposes of this paragraph, the term “Wholesale Cost” shall mean the sum of seventy-nine dollars (\$79.00); . . .

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(g) Preliminary Promotions. The parties desire to conduct certain Special Promotions prior to the Program Start Date (each, a “Preliminary Promotion”), which shall not be deemed to be part of the Program. Accordingly, during the period on and after the date hereof and ending on August 31, 1999 (the “Preliminary Period”), CPSI shall conduct at least two (2), but not more than six (6), Preliminary Promotions. . .

5. Cubeta considers the Contract Skywizard’s “lifeblood.” The vast majority, if not all, of Skywizard’s subscribers are people who bought computers through CPSI. Skywizard has two types of subscribers: paying and “prepaid.” Paying subscribers are charged between \$16.39 and \$21.95 per month. Prepaid subscribers consist of those who signed up with Skywizard after purchasing computers during CPSI’s Special Promotions, in which they are offered one year’s free internet access through Skywizard.

6. As of the time of trial Skywizard had about 6,200 subscribers,<sup>3</sup> of whom approximately 2,200 (roughly one-third) were prepaid. Inasmuch as CPSI did not begin running Special Promotions until summer 1999, the year’s free service will not expire for the first prepaid subscribers until summer 2000. Only then will Skywizard begin to be able to quantify how many prepaid customers will elect to continue with Skywizard (thereby converting to paying-customer status) at the expiration of a free-service year.

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<sup>3</sup>This includes approximately 200 “trial” subscribers, who subscribe for a free two-week trial period.

7. CPSI pays Skywizard \$79 per computer shipped as a result of a Special Promotion, in consideration for the offer to CPSI's customers of one year of free internet access. Approximately 2,200 CPSI customers have elected to take advantage of the year's free access by signing up with Skywizard — representing about one-third of the total of 6,677 Special Promotion customers to whom computers had been shipped through March 2000. Skywizard has not to date imposed a deadline by which the offer must be accepted. However, Skywizard does not contact CPSI Special Promotion customers to inquire why they have not signed up or to encourage them to do so.

8. Skywizard incurs an average wholesale cost of \$10.25 per subscriber per month for phone connections to the internet. In the case of Special Promotion customers, this cost is not incurred unless and until the customer subscribes for the year's free internet service. For each of those Special Promotion subscribers, Skywizard incurs a loss of approximately \$3.67 per month (or \$44.04 per year), representing the average wholesale cost of \$10.25 per month minus the CPSI Special Promotion fee, equal to \$6.58 per month. Skywizard also has overhead costs that include payroll for its twenty-six employees and the cost of leasing office space.

9. Many variables factor into a consumer's choice of ISP, including (i) name-brand recognition, (ii) availability of technical support (Skywizard offers technical support from 9 a.m. to 11 p.m. Eastern Standard Time; AOL offers it twenty-four hours a day), (iii) ease of connection to the service (one must dial an 800 number to access Skywizard's service); (iv) price (some advertiser-supported ISPs offer free service), (v) availability of a local access number, thus avoiding toll charges to connect to the internet (Skywizard has not been able to provide local access numbers to all interested in subscribing) and (vi) availability of a high-speed cable connection (which Skywizard does not offer).

10. Both Cubeta and Christopher Smith, Skywizard's technical director, acknowledge

that as a result of CPSI's infomercials, the inclusion of Skywizd promotional literature with units shipped by CPSI and the display of Skywizd icons on the screens of units shipped by CPSI, every CPSI customer has heard of Skywizd. Thus, in choosing a competing ISP, the customer is affirmatively choosing not to subscribe to Skywizd.

11. As of the time of trial Skywizd contended that CPSI had failed to: (i) remove the so-called "online services folder" from the desktop display of certain computers it shipped; (ii) ensure that the icons of competitors such as AOL were inaccessible from the Start menu of all such computers; (iii) install the correct Skywizd software (for a period of time); (iv) accord Special Promotions even-handed treatment *v*s a *v*s regular promotions; for example, choosing to air Special Promotions at bad times (*e.g.*, Christmas Day and New Year's Day) and simultaneously selling computer models that competed with Special Promotion models; and (v) run the September 1999 Special Promotion. Skywizd also sought permanent injunctive relief.<sup>4</sup>

12. Cubeta estimated that CPSI's alleged breaches in categories one through three (*i.e.*, failure to remove the icons of competitors and temporary installation of the wrong software) cost Skywizd at least 4,500 subscribers (or 15 percent of approximately 30,000 computer units shipped since Skywizd and CPSI joined forces). He based this estimate primarily on his belief that in the world of the internet, "convenience is everything" and that "exclusivity is everything to us." However, he and Smith acknowledged that they did not know how many customers had been lost as

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<sup>4</sup>Neither the original nor amended complaint demands injunctive relief. Skywizd contended at trial that this request was encompassed in its general prayer for relief — *i.e.*, "for such other and further relief as the Court may deem just and proper." However, a request for injunctive relief is serious business, and I have never seen a situation in which a party sought permanent injunctive relief without having specifically pled it. I nonetheless need not decide this question, and shall assume the request to have been properly pled, inasmuch as nothing in this decision turns on the inclusion of a prayer for injunctive relief.

a result of these breaches.

13. Skywizard calculated lost profits of \$270 per subscriber — derived from assuming an initial subscriber base of 5,000, an attrition rate of two percent per month and a profit margin per subscriber of roughly \$6 per month (its \$16.39 monthly charge to the customer minus its average \$10.25 wholesale cost of purchasing telephone service), and projecting that expected profit margin over a period of nine years and ten months.

14. Skywizard thus sought \$1,215,000 in damages for breaches in categories one through three.

15. Cubeta estimated that breaches in category four (*i.e.*, uneven treatment of Special Promotions) cost Skywizard 3,020 subscribers, based on his belief that the Special Promotions, which represented “one-fourth of [CPSI’s] sales energy for the month,” should have generated a minimum of twenty percent of that month’s sales instead of what he calculated as twelve percent. Based on his estimate of 30,000 units shipped, Cubeta concluded that 6,000 should have been Special Promotion units. Subtracting his figure of 2,980 Special Promotion units shipped, he arrived at a bottom line of 3,020 lost Special Promotion subscribers. He pared their value to \$135 per subscriber, or half of the \$270 per subscriber valuation, in recognition of the fact that Skywizard had not yet had an opportunity to determine what percentage of prepaid customers would convert to paying status. Skywizard thus sought a total of \$407,700 in damages for breaches in category four.

16. CPSI failed to run a Special Promotion in September 1999. For this claimed breach Skywizard sought two components of damages: (i) the lost fee of \$79 per computer shipped and (ii) lost profits of \$135 per subscriber. Cubeta estimated, based on actual sales figures and promises made by Cappell, that 1,500 units would have been shipped as a result of a September 1999 Special Promotion, for lost fees totalling \$118,500. He further calculated that, of those 1,500, one-third

would have subscribed to Skywizzard, representing lost profits of \$67,500 (500 x \$135 per subscriber).

17. Skywizzard has not to date made a profit.

## **II. Conclusions of Law**

1. To prevail in an action for breach of contract, a plaintiff must prove “(1) breach of a material contract term; (2) causation; and (3) damages.” *Maine Energy Recovery Co. v. United Steel Structures, Inc.*, 724 A.2d 1248, 1250 (Me. 1999).

2. With respect to all of Skywizzard’s claims except that for failure to run the September 1999 promotion, even assuming *arguendo* that Skywizzard proved breach of a material term of the Contract, it proves neither causation nor damages.

3. Turning first to causation, Skywizzard acknowledges that a variety of considerations may factor into a customer’s choice of ISP and that all CPSI customers are informed of the availability of Skywizzard. Skywizzard has not polled CPSI customers who choose not to subscribe to determine why they elect not to do so. Cubeta and Smith acknowledge that they do not know how many customers have been lost as a result of the alleged exclusivity and software-loading breaches or the alleged uneven treatment of Special Promotions.

4. For these reasons, Skywizzard fails to demonstrate causation, *i.e.*, that any of these alleged acts or omissions caused it injury or harm. This is fatal not only to its claim for damages but also to its prayer for a permanent injunction. *See, e.g., Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc.*, 183 F.3d 10, 15 n.2 (1st Cir. 1999) (district court must find, *inter alia*, that “plaintiff prevailed on the merits of its claim” before issuing a permanent injunction); *State of Maine v. United States Dep’t of Labor*, 770 F.2d 236, 238 (1st Cir. 1985) (hypothetical threat insufficient to warrant injunctive relief).



5. Even assuming Skywizard had proved causation, its founders in establishing damages. “In order to be recoverable, damages must not be uncertain or speculative but must be grounded on facts in evidence.” *Tang of the Sea, Inc. v. Bailey’s Quality Seafoods, Inc.*, 721 A.2d 648, 650 (Me. 1998) (citations and internal quotation marks omitted). Skywizard claims lost profits of \$270 per subscriber; however, its calculation rests on the use of both erroneous data and questionable methodology. Most significantly, Skywizard assumes a net profit margin of \$6 per month per subscriber when, in fact, in the case of approximately one-third of its subscribers it is losing \$3.67 per month. Skywizard also chooses, in calculating its expected “profit,” to factor in only its cost of acquiring phone access, omitting such presumably significant costs, among others, as payroll and the provision of office space. There is no explanation why, in adopting a profit-based valuation methodology, such costs would be overlooked.

6. CPSI did not run a Special Promotion in September 1999. This constituted a material breach of paragraph 7(a) of the Contract.

7. The evidence does not support Skywizard’s estimate that had the September 1999 Special Promotion aired, 1,500 computers would have been shipped. As of March 12, 2000 only one Special Promotion had generated shipments in excess of 1,500 computers — the August 21, 1999 show, which generated shipments of 1,820 computers. Through March 12, 2000 the following additional Special Promotion shows had generated the following shipments: July 3, 1999: 320; July 24, 1999: 40; August 7, 1999: 729; August 9, 1999: 48; August 14, 1999: 729; October 2, 1999: 734;<sup>5</sup> November 20, 1999: 824; December 26, 1999: 1,348. The average number of shipments

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<sup>5</sup>There is an apparent typographical error in the Summary of Shipments submitted as Defendant’s Exhibit 8, consisting of the omission of a show date for 478 units shipped during the week of November 15-21, 1999. These units logically would have been shipped as a result of the (continued...)

produced by all nine of these shows was 732; however, shows that aired prior to October were so-called “preliminary promotions” and thus should be excluded from the calculus. Three regular Special Promotions aired in October, November and December 1999; the average number of shipments generated by these through March 12, 2000 was 969. However, inasmuch as the October show generated only 734 shipments and the November show 824, there is no reason to believe that the September show would have generated significantly higher numbers. Accordingly, the evidence supports a finding that 800 computers would have been shipped had the September show aired.

8. Of the 800 CPSI customers to whom computers would have been shipped had the September 1999 Special Promotion aired, approximately one-third, or 267, would have become Skywizard subscribers.<sup>6</sup>

9. Skywizard’s damages total \$51,441.32, calculated as follows: \$63,200.00 (800 computers shipped x \$79 fee) minus \$11,758.68 (267 new prepaid subscribers x loss of \$44.04 each incurred to service accounts for one year).

10. Skywizard’s further claim for \$135 in lost profits per subscriber is not substantiated, for the reasons discussed in paragraph II(5), above.

11. Skywizard’s request for a permanent injunction is inapposite in this context, inasmuch

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<sup>5</sup>(...continued)  
preceding show, which aired on October 2, 1999, and I shall therefore so categorize them.

<sup>6</sup>Counsel for the defendant pointed out at trial that, were all of CPSI’s Special Promotion customers to take advantage of the offer of one year’s free internet service (as they theoretically could), the \$79 per customer fee would be more than offset by the cost to Skywizard of servicing all of the new subscribers. However, the evidence demonstrated that historically one-third of these customers had chosen to subscribe to Skywizard. Nothing in the evidence nor in everyday experience compels the conclusion that customers who elect not to take advantage initially of the offer of one year’s free service (and thus affirmatively reject Skywizard’s service) will attempt to accept that offer weeks or months later.

as Skywizard has acknowledged that since September 1999 monthly Special Promotions have been held and it has been paid for computers shipped as a result.

In light of the foregoing, judgment shall enter in favor of Skywizard and against CPSI for the sum of \$51,441.32. The requested relief is in all other respects denied.

So ordered.

*Dated this 2nd day of May, 2000.*

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*David M. Cohen*  
*United States Magistrate Judge*

CLOSED STNDRD  
U.S. District Court  
District of Maine (Portland)  
CIVIL DOCKET FOR CASE #: 99-CV-275  
SKYWIZARD COM LLC v. COMPUTER PERSONALITI  
Filed: 09/08/99  
Assigned to: MAG. JUDGE DAVID M. COHEN  
Jury demand: Plaintiff  
Demand: \$0,000  
Nature of Suit: 190  
Lead Docket: None  
Jurisdiction: Diversity  
Dkt# in other court: None  
Cause: 28:1332  
Diversity-Contract Dispute  
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